

01294

Alan Zuckerman

Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: b-187386

DATE: November 15, 1976

MATTER OF: Blake Construction Company, Inc.

DIGEST:

Contract modification may not be reformed to delete an item of work or alternatively increase contract price because of contractor's unilateral mistake in price proposal of which Government was unaware.

Blake Construction Company, Inc. (Blake) requests the reformation of contract modification No. P-00004 under Army Corps of Engineers contract No. DACA 31-71-C-0178 to increase the price of such modification by \$4,000.00. The request for reformation is based upon an asserted mutual mistake in the negotiation of the modification because of the failure to consider the costs for a portion of the work effort required.

Contract No. DACA 31-71-C-0178 in the amount of \$9,988,000 was awarded to Blake on June 23, 1971, for the Phase I construction of the Harry Diamond Laboratories.

On November 9, 1971, the Government orally requested the contractor to revise the dimensions of electric manhole #1. The contractor acknowledged the request by a letter to the area engineer dated November 9, 1971. In addition to referencing the contract number, the letter carried the reference "Electric Manholes, PCO #7". In pertinent part, the letter contained the following statements:

"It is understood that the above work will be incorporated into a field change order to be issued by your office.

"In accordance with Mr. Stewart's verbal directive, we are proceeding with the above changes to the work and will submit our cost incurred accordingly."

The designation "PCO 7" is a contractor internal file designation.

B-187386

On November 15, 1971, the Government issued a Request for Proposals for a modification to the contract which contained two items of work. Item A specified revisions to storm drain catch basins, and Item B, the dimension revisions to electrical manhole #1.

On April 18, 1972, Blake submitted a price proposal referencing the contract number and carrying the designation "Re: Field Change #2, Blake PCO #8." The proposal was in the total amount of \$5,983.00, and is asserted to be based on the proposal from a Blake subcontractor, Maurice P. Foley and Company, Inc. The Foley proposal was not part of the price proposal submitted to the Government.

The Government's report to this Office states that the Blake proposal was considered excessive for all of the work (Items A and B of the RFP), and that on May 22, 1972, modification P-00004 was negotiated in the amount of \$3,850.00. The written modification setting forth Item A (catch basins) and Item B (electrical manhole #1) was furnished to Blake for signature on May 25, 1972. The contractor signed the document on June 16, 1972.

On February 9, 1973, the contractor forwarded a proposal for \$4,499.00 for the work required for electrical manhole #1 (Blake PCO #7), which was rejected as having been included in modification P-00004.

Subsequently, the area engineer (who is reported to have had no personal knowledge of the facts and circumstances surrounding the negotiation of the modification) negotiated a price of \$4,000.00 for the electrical manhole work upon his belief that such work was not included in the modification because of a "mutual mistake." The contract modification formalizing the foregoing negotiation was apparently never issued. Without elaborating further, it is clear that the area engineer lacked the requisite authority to "reform" the contract modification. 45 Comp. Gen. 496 (1966).

The agency report to this Office states that (i) the Government negotiators were not aware that the price proposal submitted by the contractor which resulted in the price agreed for modification P-00004 of \$3,850 did not include the electrical manhole work, since the proposal did not specify by name the work area involved, (ii) the Government negotiators intended to negotiate a price for all work included in the RFP for the modification,

(iii) the proposal was considered excessive for all the work (including the electrical manhole), and (iv) the error, if any, was strictly unilateral inasmuch as it resulted only from the contractor's internal filing system designations (PCO #7, PCO #8) of which the Government was unaware.

In support of his position that the asserted error resulted from a mutual mistake of the parties to the negotiation, the contractor wrote to the agency on April 23, 1976, stating in pertinent part that:

"Separate files were established by this office to cover the revisions to Primary Electric Manhole #1 (PCO #7) and for Relocated Catch Basins (PCO #8). Your Field Change #2, dated November 15, 1971, incorporated all of the required revisions for the Catch Basins and the Electric Manhole. Our office then erred in that we did not combine both of our files (PCO #7 and PCO #8) at that time, but sent out letters to affected subcontractors for Item A of Field Change #2 under PCO #7 and Revisions to Electric Manhole under PCO #8.

"The enlargement of Electrical Prime Service Manhole #1 obviously involved the work of our electrical subcontractor, as well as additional concrete work. The proposal forwarded under Blake PCO #8, for Field Change #2 obviously did not include the electrical or concrete work required.

" * * * At no time during these negotiations did either the writer or the Corps of Engineers' representatives realize that we had overlooked the additional electrical and concrete work required by Item B of Field Change #2."

From the record before us, we believe it is fair to state that the Government intended to include the entire work effort specified in the RFP in the negotiated price and the consequent contract modification. That the Government reasonably considered Blake's original price proposal excessive for all items of work is in some measure borne out by the subcontractor's price proposals ultimately furnished by Blake to the agency. The electrical subcontractor's detailed proposal indicates that the change

B-187386

is essentially one of excavation framing, minor amounts of concrete, and engineering. We are unable to conclude that it should have been obvious to the Government that the price proposal submitted originally did not encompass such work (we note for example that the Blake proposal also includes such items as excavation, engineering, and drawings), nor are we persuaded that the Government can be charged with notice of the limitation of the original price proposal merely because the contractor designated it as "PCO #8" in keeping with the firm's internal accounting procedures.

In addition, the completed agreement, clearly specifying all items of work and the price negotiated was in the possession of the claimant from May 25, 1972 to June 16, 1972. Any failure to read and understand the clearly expressed terms of the agreement is due solely to the claimant's own negligence, and cannot be offered in the claimant's defense. Hyde Park Clothes, Inc. v. United States, 114 Ct. Cl. 424, 84 F. Supp. 589 (1949). The record suggests, therefore, that the agreement reflected precisely what was negotiated, and any error was unilateral and due at least in part to the contractor's identification system which divided the individual items of work in the RFP into two parts.

The purpose of reformation is to make a mistaken writing conform to the agreement which the parties made; it is not available for the enforcement of terms to which one of the parties never assented. 3 Corbin, Contracts § 614 (1960). Consequently, since the Government intended to include all items of work set forth in the RFP in the negotiated modification, and since the Government cannot be fairly charged with actual or constructive knowledge of the contractor's omission, we find no basis for allowing the claim.


Acting Comptroller General
of the United States